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Mr. Zerkowitz

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Claim For Backpay and

FILE: B-197902

DATE: February 13, 1981

MATTER OF: James R. Elliott - Retroactive Reinstatement
to Competitive Service

DIGEST: Employee claims backpay pursuant to 5 U.S.C. § 5596 (1976), for salary he would have received if Headquarters Personnel Director of NASA in February 1977 had not misinterpreted highest previous rate rule, thereby causing employee to reject reinstatement from excepted to competitive service. In July 1978, NASA reinstated him at higher rate to rectify earlier mistake. His claim is denied as reinstatement to competitive service was solely within discretion of Administrator of NASA and, until July 1978, claimant's reinstatement was not approved by anyone in NASA authorized to do so.

This decision is in response to a request from Mr. James R. Elliott for reconsideration of our Claims Division's settlement of December 26, 1979, by which his claim for backpay was denied.

The claimant alleges that he is entitled to backpay because, if it had not been for the wrongful interpretation by NASA of the highest previous rate rule, he would have been converted from the excepted service to the competitive service and assigned to grade 15, step 10, effective the 6th pay period of 1977 instead of July 2, 1978, when he was actually reinstated and assigned to grade 15, step 10.

Until his reinstatement to the competitive service in 1978, Mr. Elliott's position was excepted from the competitive service and his salary was fixed administratively by virtue of NASA's authority to appoint not more than 425 of its personnel without regard to the Civil Service Laws. 42 U.S.C. § 2473(c)(2). In February of 1977, Mr. Elliott's supervisor, with his consent, proposed that his position should be converted because he would be entitled

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to a higher salary if his pay was determined under the General Schedule. However, the proposal by his supervisor was withdrawn from further consideration because Elliott believed that, under the highest previous rate rule, his appropriate conversion pay rate should have been set at grade GS 15, step 10, rather than a GS 15, step 7, which he was offered.

Upon review of this matter in 1978, the Headquarters Personnel Director of NASA stated that, if it were not for his incorrect interpretation of the highest previous rate rule, Mr. Elliott, upon reinstatement to the competitive service in 1977, would have been assigned to grade 15, step 10. To rectify this mistake, despite the adoption of a new highest previous rate rule by NASA which made assignment to the 10th step of grade 15 inappropriate in this case, Mr. Elliott was reinstated from the excepted service to the competitive service and assigned to grade 15, step 10, effective July 2, 1978.

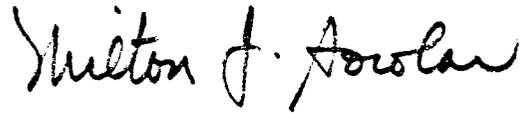
As a general rule, [an administrative change in salary may not be made retroactively effective in the absence of a statute so providing.] 40 Comp. Gen. 706 (1947); B-193918, September 21, 1979. [However, we have permitted a retroactive personnel action where clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively.] We have recognized that the above-stated exceptions to the general rule prohibiting retroactively effective personnel actions may constitute "unjustified or unwarranted personnel actions" under the Back Pay Act, 5 U.S.C. § 5596 (1976). B-193918, September 21, 1979; B-186816, April 25, 1977.

[None of the three exceptions apply to the present claim.] The proposed conversion was withdrawn in 1977 and hence there was no agency intent to carry out a personnel action at that time, nor did the employee have any right under statute or regulation.

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Finally, the granting of Elliott's reinstatement to the competitive service and the conversion of his salary to the General Schedule was a discretionary matter solely within the province of the Administrator of NASA, 42 U.S.C. § 2473(c)(2) (1976). Consequently, although Elliott's proposed reinstatement was approved by his immediate supervisor, NASA maintained discretion whether to reinstate him in 1977 as his reinstatement was not approved by anyone in NASA authorized to take final classification action. Thus, his failure to accept reinstatement in 1977 cannot be regarded as resulting from a failure to carry out any nondiscretionary regulation or policy which would have required that he be reinstated.

For these reasons, we find no unjustified or unwarranted personnel action which would allow a retroactive reinstatement with accompanying backpay. Accordingly, the disallowance of Mr. Elliott's claim is sustained.



For The Comptroller General
of the United States